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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

STEAMFITTERS LOCAL UNION NO. 420 WELFARE FUND, ET AL.,

Petitioners,

v.

PHILIP MORRIS, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The decisions below are unprecedented. They have disabled the only conceivable plaintiffs from suing under the RICO and antitrust laws for the multibillion-dollar tobacco-related economic loss at issue. In what one trial court has described as the "mother of all RICO actions," *Florida v. American Tobacco Co.*, No. CL95-1466, slip op. (Fla. Cir. Ct. Dec. 13, 1996), respondents claim that there is no RICO remedy.

Petitioners are the only possible RICO and antitrust plaintiffs. No one else can sue for the economic injury suffered by the trust funds — not smokers, not employers, not insurers. Never before has this Court, or any other lower court identified by respondents, approved a standing/proximate cause inquiry which precluded all possible plaintiffs from suing for a given economic loss. The purpose of the standing/proximate cause inquiry is to strengthen statutory enforcement by concentrating each claim in a single plaintiff, not to weaken enforcement by precluding claims by the sole plaintiff capable of suing. The lower courts did not merely misapply the proximate cause factors of *Holmes v. SIPC*, 503 U.S. 258 (1992); rather, they turned the concept of standing upside down by effectively granting RICO and antitrust immunity to the tobacco defendants with respect to claims involving non-governmental medical care costs.

This Court has held that the federal antitrust statutes do not preempt state antitrust laws. *California v. ARC America Corp.*, 490 U.S. 93 (1989). In a bizarre twist of that holding, respondents contend that state products liability actions by individual smokers somehow work a *reverse preemption* of federal RICO and antitrust remedies by health trust funds suing for medical costs that the smokers never bore. Yet RICO and antitrust were meant to *supplement* (not to be *supplanted by*) what Congress perceived as inadequate existing state remedies. Whether the availability of common law remedies to *one* set of plaintiffs may displace federal RICO and antitrust claims for *different* damages by a *different* set of plaintiffs is a question of vital public importance. And this case is a particularly good vehicle to address that question, for — as the Third Circuit properly noted — "there is little danger of duplicative

litigation or complex apportionment of damages." App. in No. 99-545 at 25a. Indeed, respondents' concession that the health trusts may sue in subrogation (Opp. Cert. 5, 11) demonstrates that there is no genuine threat of duplicative suits by employers or insurers, for if such a risk existed, it would also apply to the funds' subrogation claims.

1. Conflicts with decisions of this Court. The decisions below conflict with the many decisions of this Court holding that a plaintiff may sue under RICO or the antitrust laws for injuries arising from effects mediated through a third party. In *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), for example, this Court held that a Blue Cross plan participant could bring an antitrust suit against an alleged unlawful conspiracy which had incidentally harmed her. Contrary to respondents' suggestion, this Court did not opine that McCready was "directly injured." Opp. Cert. 12. Rather, McCready was injured only incidentally; she represented precisely the class of patients whom defendants had *failed* to dissuade from seeing and paying psychologists. McCready and her class were not the causal means by which any injury was inflicted at all. It was the patients who *were* dissuaded from seeing the psychologists who were the causal means by which the injury of lost business was inflicted on the psychologists. McCready's injury was merely an unintended byproduct of the defendants' using the denial of reimbursement successfully to dissuade *other* patients not to see psychologists. Nonetheless, this Court held that McCready *had* standing even though she was not a direct competitor or consumer of defendants (she did not buy insurance and did not want to buy psychiatry services) and was not a direct participant in the restrained market. 457 U.S. at 479. "Her psychologist can link no claim of injury to himself [because] . . . he has been fully paid . . . And whatever the adverse effect of Blue Shield's actions on McCready's employer, who purchased the plan, it is not the employer as purchaser, but its employees as subscribers, who are out of pocket as a consequence of the plan's failure to pay benefits." 457 U.S. at 475. The same reasoning applies here: the funds, who are directly out of pocket, may sue under RICO and antitrust, while smokers may not.

Similarly, in *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994), this Court held that a business has standing to sue for injuries to its property by virtue of racketeering-inflicted personal injuries to its workers. Respondents' claim that *NOW v. Scheidler* was limited to Art. III standing is flatly wrong: the *Holmes* factors were briefed and argued before this Court. *See* Br. of Respondents Randall A. Terry, *et al.*, No. 92-780, 1993 WL 459719, at *11 (Sept. 29, 1993).

Respondents claim that *Associated General Contractors v. California State Council*, 459 U.S. 519 (1983), and *Holmes v. SIPC*, 503 U.S. 258 (1992), stand for the proposition that there may be a RICO or antitrust violation without a remedy. But in fact both cases recognized that there *would* be a plaintiff to bring a federal statutory suit for the injuries involved. In *Holmes*, this Court recognized that its holding did not necessarily bar indirect claims (1) by brokerage clients suing for manipulation of stock they purchased from the brokerage firm, *see* 503 U.S. at 272 n.19, and (2) by nonpurchasing brokerage clients suing for stock parking that had the effect of evading the firm's capital requirements. *Id.* In *AGC* this Court opined that unionized subcontractors *could* sue even though their injury was indirect. 459 U.S. at 541-42. Both *Holmes* and *AGC* specifically rejected the black-letter remoteness rule advanced by respondents in these cases. 503 U.S. at 272 n.20; 459 U.S. at 536 n.33.

Although in *AGC* this Court recited an example drawn from the facts of *Anthony v. Slaid*, 52 Mass. 290 (Mass. 1846), it included important caveats that respondents omit: "Where the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote . . . *unless the wrongful act is willful for that purpose.*" 459 U.S. at 533 n.25 (emphasis added) (citing 1 J. Sutherland, THE LAW OF DAMAGES 55-56 (1882)); *see also* 459 U.S. at 537 n.35 (the "specific intent of defendant to cause injury to a particular class of persons should 'ordinarily be dispositive' in creating standing to sue").

The Third Circuit criticized respondents' use of *Anthony*. App. in No. 99-545, 17a-18a n.5. In *Anthony v. Slaid*, there was no claim that the tortfeasor (not even the defendant himself but only his *wife*) intended the guarantor to bear increased medical costs. And

Anthony v. Slaid would surely have been decided differently if (as here) the tortfeasor had prevented the plaintiff from providing prompt first aid, leading to aggravated medical problems for the pauper and increased expense for the plaintiff.

Both the Sutherland treatise and subsequent Massachusetts cases make clear that the proximate cause test is satisfied where (as here) the defendant intends to cause injury to the plaintiff (i.e., the health trust funds). *See* 1 J. Sutherland, THE LAW OF DAMAGES 128 (1916) (citing *Gregory v. Brooks*, 35 Conn. 437, 446 (1868) (holding that defendant was liable to wharf owner for deceiving a ship captain into moving his ship, which in turn resulted in lost rent to the wharf owner; although the injury to the wharf owner was an indirect effect of the deceit on an intervening party (the ship captain), "the cases are numerous where injuries have been holden actionable although not directly committed upon the plaintiff . . . if they were intended to affect and did injuriously affect him")); *Chelsea Moving & Trucking Co. v. Ross Towboat Co.*, 280 Mass. 282, 286 (1932) (proximate cause found where there is "allegation of malice on the part of the defendant toward the plaintiff" or "deliberate design by the defendant to accomplish a definite end regardless of consequences to others").

Respondents cite *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), but that case simply declined to recognize a new substantive tort under federal common law for a claim based on "tortious interference by a third person with the relation between the Government and the soldier." *Id.* at 304. More generally, respondents' invocation of common-law principles is misplaced. The RICO and antitrust statutes were intended to overcome limitations in existing common-law remedies. And smoking by fund beneficiaries is hardly an "intervening" cause that can render petitioners' injuries "indirect" or relieve respondents of liability. Tobacco companies have deliberated targeted the blue-collar populations whom the trusts serve. Tobacco use and tobacco-related illnesses are "a normal consequence of a situation created by" the defendants' misconduct, and, as such, "not a superseding cause of harm which such conduct has been a substantial factor in bringing about." Restatement of Torts (Second) § 443 (1965).

2. The direct nature of petitioners' claim. The decisions of this Court thus establish that a plaintiff may sue under RICO or the antitrust laws for injuries arising from effects mediated through a third party. Even if they did not, however, the direct nature of the health trusts' injury would render the supposed "remoteness" principle inapplicable. The trusts' injuries derive not merely from the fact that respondents defrauded smokers; the injuries also derive from the fact that the plaintiff health funds were *directly* lied to, defrauded, and deprived of the benefits of new and safer tobacco products. This effect of defendants' misconduct on the health trusts was not mediated through any effect on a third party. Evidence adduced in the state tobacco litigation has shown that the tobacco companies specifically targeted employers, unions and health funds, health and life insurance companies, public health organizations, medical societies, health maintenance organizations, and federal, state, and local governmental bodies. The tobacco companies sought to prevent these entities from taking remedial measures to decrease smoking by workers, particularly the blue collar workers represented by the health trusts here, whose rates of smoking have remained unchanged since World War II. The tobacco companies stimulated the filing of collective bargaining grievances against employers and supported litigation by workers and their unions to prevent or end smoking restrictions. The tobacco industry furnished unions with guidelines for collective bargaining issues regarding smoking. The industry set up, through the Tobacco Institute, a Tobacco Industry Labor Management Committee ("LMC") to work with the Tobacco Institute staff and consultants to spread disinformation and influence the position of the labor movement on smoking issues. The LMC, for example, persuaded unions not to support OSHA's regulations on smoking. When in the mid-1970s Johns-Manville sought to outlaw smoking in its asbestos plants, the tobacco companies covertly assisted unions in opposing the ban: "The position of unions in the asbestos-smoking controversy is anti-anti-smoking. They are more opposed to Johns-Manville than to tobacco." (Memorandum of June 8, 1979 from Fred Panzer to Horace Kornegay).

Respondents are thus flatly wrong in suggesting that the health trusts' injuries are "entirely derivative" of the harm suffered by

smokers. Opp. Cert. 8. In fact, the economic loss suffered by the health trusts here is clearly separate from (and not derivative of) the personal injury suffered by smokers. The injury alleged is the funds' inability to take appropriate anti-smoking measures. The health effects of smoking are relevant only to the *measure* of damages, not to the fact of injury. If anything, the physical injuries suffered by smokers were derivative of the harms inflicted on the health trusts — not the other way around — because the health trusts were unable as a result of the tobacco industry's fraudulent conspiracy to take steps to protect their plan participants from illness and death.

3. Conflicts within the cases at bar. Certiorari is warranted for the further reason that there is deep confusion within, and indeed conflict among, the decisions of the courts of appeals in these very cases. For example, the Third Circuit held that "there is little danger of duplicative litigation or complex apportionment of damages." App. in No. 99-545, at 25a. The Second and Ninth Circuits disagreed. App. in No. 99-642, at 14a; App. in No. 99-791, at 19a.

The Second Circuit disagreed with itself, withdrawing its original opinion on rehearing, reconsidering the matter for twelve weeks, and issuing an amended opinion that reached the same result but that included new footnotes, inconsistent with tone and substance with the text. App. in No. 99-791, at 7a n.3, 15a n.4.

The Second, Third, and Ninth Circuits insisted that calculating tobacco-related medical costs would be impermissibly speculative. App. in No. 99-545, at 26a; App. in No. 99-642, at 11a-13a; App. in No. 99-791, at 17a-18a. Yet the Seventh Circuit concluded that "[s]tatistical methods could provide a decent answer — likely a more accurate answer than is possible when addressing the equivalent causation question in a single person's suit." *International Bhd. of Teamsters v. Philip Morris, Inc.*, 1999 U.S. App. Lexis 29907, *12 (7th Cir. Nov. 15, 1999).

The Seventh Circuit premised its holding on the assumption that individual smokers *could* bring their own antitrust and RICO actions, *id.* at *11-12, *19, and described the contrary view as "silly." *Id.* at *11. The Third Circuit indulged a similar assumption. App. in No. 99-545, at 26a n.10. Yet the other courts of appeals rejected the positions of the Third and Seventh Circuits, App. in No.

99-642, at 9a-10a; App. in No. 99-791, at 19a, as do respondents themselves. Opp. Cert. 11.

Indeed, respondents disagree with the entire approach taken by the three courts of appeals in these cases. Respondents insist that the lower courts erred in even considering the individual *Holmes* factors at all. Respondents contend there is a categorical, black-letter rule that third-party health payors are automatically too remote to recover damages. Opp. Cert. 10 n.* While respondents' argument has no validity, the fact that there is such fundamental disagreement over an important principle of federal law warrants certiorari.

4. Conflicts with other tobacco cases. Certiorari is warranted in light of the irreconcilable conflicts between the courts of appeals' judgments in these three cases and decisions in other tobacco litigation. The states typically sought damages for state employee health and welfare funds (the same damages as sought here), yet in the state tobacco cases, twenty-three out of twenty-four courts rejected the tobacco companies' motion to dismiss in whole or in part, and the industry settled for over $206 billion. The courts rejected respondents' remoteness argument in the context of federal RICO and antitrust claims, *see Texas v. American Tobacco Co.*, 14 F. Supp.2d 956, 968 (E.D. Tex. 1997); *Rosello v. Brown & Williamson*, No. 97-1910 (JAF), slip op. (D.P.R. Aug. 10, 1998); in the context of common-law claims; and in the context of state antitrust claims. *E.g., Minnesota v. Philip Morris*, 551 N.W.2d 490, 497 n.1 (Minn. 1996) (finding antitrust standing for both Blue Cross and the state, "[e]ven absent the statutory grant of authority") (mis-cited at Opp. Cert. 18 n.*); *McGraw v. American Tobacco*, No. 94-C-1707, slip op. at 6 (W. Va. 13th Cir. Feb. 13, 1997) (relying on *McCready*); *Washington v. American Tobacco Co.*, 1996 WL 931316, at *5 (Wash. Super. Ct. 1996) (holding that state would have standing even absent special statute); *Illinois v. Philip Morris, Inc.*, No. 96L 13146, slip op. at 8 (Ill. Cir. Ct. Nov. 13, 1997) (*Holmes* factors met because "the State alleges that Defendant's tortious conduct was directed not only to third parties but also towards the State itself .... Defendants not only foresaw but also intended that one of the consequences of their conduct was that the State would spend hundreds of millions of dollars").

Respondents claim that the state cases are distinguishable because states may sue in "quasi-sovereign" or parens patriae capacity by virtue of their "unique role relative to protection of [their] citizens." Opp. Cert. 17, 18. But the ability of states to sue under RICO and antitrust laws (both federal and state) is not based on a brooding omnipresence regarding state authority, but is simply a matter of statute, just as it is for health trust funds. Indeed, the health trusts have clearer authority to sue: although the tobacco companies vigorously contested (and still contest) the parens patriae theory, the right of health trusts to sue is undisputed. 29 U.S.C. § 1132(d)(1). In any event, the trusts enjoy a similar special relationship, "a type of *parens patriae* relationship with their insureds which is analogous to the parent-child relationship." *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 36 F. Supp.2d 560, 581 (E.D.N.Y. 1999).

5. Conflicts with non-tobacco cases. The courts of appeals' decisions in these cases cannot be reconciled with the great weight of decisions outside the tobacco context. *See* Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW 95 & n.8 (1999 supp.). Respondents rely on the court of appeals' own efforts to distinguish established precedent, but these points have already been largely anticipated in the Petitions for Certiorari. *See, e.g.*, Pet. in No. 99-545, at 17-18 n.7 (rebutting Third Circuit's attempt to distinguish *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1168-69 (3d Cir. 1993)).

Respondents cite the Fourth Circuit's observation in *Mid Atlantic Telecom v. Long Distance Servs.*, 18 F.3d 260 (4th Cir. 1994), that a competitor's fraudulently low telephone rates caused a telephone company distinct injuries that were "not derivative of any losses suffered by its former customers." *Id.* at 264. But the court's reasoning proves our point: "[C]ustomers, of course, were the direct victims of the defendants' scheme to fraudulently inflate their telephone bills. Given the opportunity to engage in discovery, however, Mid Atlantic may be able to show that while the scheme was initially aimed only at defrauding ... customers, [the defendant] broadened the sweep of the intrigue to include Mid Atlantic as a direct target (i.e., to obtain an unfair competitive advantage in recruiting Mid Atlantic customers)." *Id.* at 263. Similarly, the

tobacco defendants included the health trusts as a target of their fraud. Respondents' own argument demonstrates the circuit split.

Respondents follow the Seventh Circuit in attempting to distinguish *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996), by noting the language in *Marshfield Clinic* that "[i]f the patients paid the entire fees to the Clinic and then were reimbursed in whole or part by Blue Cross, the Clinic would be right; only the patients could sue." *Id.* at 1414. But that caveat in the *Marshfield Clinic* opinion is immaterial. Here, the health trusts (not the smokers) paid the medical bills directly and suffered a direct injury. Moreover, the health trusts also dealt directly with the tobacco companies, in the sense that the health trusts were direct recipients of fraudulent information from the tobacco companies.[1]

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[1] Respondents invoke a number of alternative grounds for affirmance. Opp. Cert. 19 n.*. Unlike the courts of appeals below, respondents insist that the health trusts did not suffer injury to "business or property." However, the funds' economic injuries are not the same as, nor simply derived from, their beneficiaries' personal injuries. *See Scheidler*, 510 U.S. at 249; *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris*, 23 F. Supp.2d 771, 790 (N.D. Ohio 1998); *New Jersey Carpenters v. Philip Morris*, 17 F.2d 324, 338-39 (D.N.J. 1998); *Jerry Kubecka, Inc. v. Avellino*, 898 F. Supp. 963, 969 (E.D.N.Y. 1995).

Respondents also argue that an antitrust (although not a RICO) plaintiff must be a consumer or competitor in the restrained market. No decision of this Court has ever imposed such a requirement. *McCready* opined that the antitrust "'statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.'" 457 U.S. at 472. Likewise, *Associated General* expressly rejected any test based on whether the plaintiff was in the "area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." 459 U.S. at 536 n.33. This is an issue on which the lower courts are divided and by itself warrants certiorari. *See Sullivan v. Tagliabue*, 25 F.3d 43, 49 (1st Cir. 1994) (discussing conflicting decisions); *see also Province v. Cleveland Press Pub. Co.*, 787 F.2d 1047, 1052 (6th Cir. 1986); *Ostrofe v. H.S. Crocker Co., Inc.*, 740 F.2d 739, 745-46 (9th Cir. 1984); *Ashmore v. Northeast Petroleum Division of Cargill*, 843 F. Supp. 759, 769-70 (D. Me. 1994); *Donahue v. Pendleton Woolen Mills*, 633 F. Supp. 1423, 1435-39 (S.D.N.Y. 1986).

Respondents' further claims of inadequate pleading and of "common knowledge" (but not of addiction, manipulation of nicotine, or targeting of children) were not accepted by the courts of appeals and are makeweight.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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